The Director General of Customs Malaysia and The Director of Customs, Sarawak & Ors v Chong Yin Kim Trading Sdn Bhd & Ors and another appeal

HIGH COURT (KUCHING) — CRIMINAL APPEAL NOS KCH-42(ORS)-2/5 OF 2016 AND KCH-42(ORS)-3/5 OF 2016
RHODZARIAH BUJANG J
24 AUGUST 2016

Customs and Excise — Seizure — Seizure of goods — Appellant failed to prosecute within one month of seizure — Trial judge allowed respondents' application for release of goods — Whether trial judge erred in relying to s 128 of the Customs Act 1967 to justify release of goods — Whether order of release of goods wrong — Customs Act 1967 ss 114, 115, 128 & 129

This was an appeal by the appellants against the decision of the learned sessions court judge in ordering the release of goods and items seized by the Royal Malaysian Customs Department from the respondents pursuant to the respondents' application under ss 115, 128 and 129 of the Customs Act 1967 ('the Act'); and her decision not to grant a stay of the order of release pending the appeal against release order. The appellants submitted that it was wrong for the learned sessions court judge to rely on the non-prosecution within one month of seizure under s 128 of the Act to justify the release of the goods for the correct provision was s 114 of the Act, whereas the respondents contended otherwise. The appellant further submitted that the order of release was bad because the goods seized were the subject matter of the charge which was still pending in court.

Held:

(1) Sections 114 and 128 are distinct provisions whereby the latter does not stipulate that the prosecution of the offence for the goods seized must be done within one month from the date of the seizure. Section 128 only deemed forfeiture of the goods seized if there was no prosecution within one month from the date of the seizure unless the three situations as stated in sub-s (1)(a)–(c) happened (see para 9).

(2) Section 115(1) of the Act clearly confers on the customs officer the power to return the goods pending the trial but subject to terms and condition. The release of the goods seized could not be said to be wrong because s 115(1) allows it but it comes with certain safeguards which the learned

sessions court judge should have but did not do so in the present case. In the circumstances, the appeal against the stay order was rendered redundant (see paras 10–11 & 15).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu-perayu terhadap keputusan hakim mahkamah sesyen yang bijaksana dalam memerintahkan perlepasan barangan dan benda yang dirampas oleh Jabatan Kastam DiRaja Malaysia daripada responden-responden berikutan permohonan responden-responden di bawah ss 115, 128 dan 129 Akta Kastam 1967 ('Akta'); dan keputusannya untuk tidak memberikan perintah perlepasan sementara menunggu rayuan terhadap perintah perlepasan tersebut. Perayu-perayu berhujah bahawa ia adalah salah bagi hakim mahkamah sesyen yang bijaksana untuk bergantung ke atas bukan pendakwaan dalam masa sebulan daripada perampasan di bawah s 128 Akta untuk menjustifikasikan perlepasan barangan kerana peruntukan betul adalah s 114 Akta, sementara responden-responden berhujah sebaliknya. Perayu selanjutnya berhujah bahawa perintah perlepasan adalah tidak betul kerana barangan yang dirampas adalah perkara tuduhan yang masih belum didengar di mahkamah.

Diputuskan:

(1) Seksyen 114 dan 128 adalah peruntukan berbeza di mana s 128 tidak menyatakan bahawa pendakwaan kesalahan barangan yang dirampas mesti dilakukan dalam masa sebulan dari tarikh perampasan. Seksyen 128 hanya dianggap perampasan terhadap barangan yang dirampas jika tidak terdapat pendakwaan berlaku dalam masa sebulan dari tarikh perampasan kecuali ketiga-tiga keadaan seperti yang dinyatakan dalam sub-s (1)(a)–(c) (lihat perenggan 9).

(2) Seksyen 115(1) Akta jelas memberikan kuasa kepada pegawai kastam untuk memulangkan barangan sementara menunggu perbicaraan tetapi tertakluk kepada terma dan syarat. Perlepasan barangan yang dirampas tidak dapat dikatakan salah kerana s 115(1) membenarkannya tetapi ia boleh digunapakai dengan pelindungan tertentu yang mana hakim mahkamah sesyen yang bijaksana sepatut menggunakannya tetapi tidak berbuat sedemikian dalam kes ini. Dalam keadaan ini, rayuan terhadap perintah penangguhan adalah tidak diperlukan (lihat perenggan 10–11 & 15).]

Notes

For cases on seizure in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 226–232.

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 44

Customs Act 1967 ss 114, 115, 115(1), (1)(a), (1)(b), (1)(c), 127(1A), 128, 128(1)(a), (1)(b), (1)(c), (2), (4), 129, 131

Anis Wahidah (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Shankar Ram (Daniel Ling with him) (Thomas, Shankar Ram & Co) for the respondents.

Rhodzariah Bujang J:

INTRODUCTION

[1] These two appeals, filed by the Director General of Customs, the Director of Customs, Sarawak, the Ministry of Finance and the Government of Malaysia are against the decision of the learned sessions court judge in ordering the release of goods and items seized by the Royal Malaysian Customs Department ('the customs department' for short) from the respondents and her other decision not to grant a stay of the order of release pending the appeal against the release order.

THE SEIZURE

[2] That was done on 1 November 2015 at the premises of the first respondent. What were seized consist of, inter alia, invoices, alcoholic beverages, twenty gunny sacks of sugar and computers, the details of which I would not reproduce in this judgment given that they are numerous and because what was ordered to be released have been listed in the court order at pp 9–13 of the appeal record Vol 1.

[3] Following the seizure, the customs department obtained an order to freeze 12 bank accounts held under the appellants' names, either individually or jointly which are particularised in the same release order and this appears at pp 13–14 of the appeal record Vol 1 although in the said order only ten of the said accounts have been ordered to be unfrozen by the learned sessions court judge, leaving the other two accounts frozen. I need not have to consider that part of the order because it is not the subject matter of the appeal before me. The reason why they are not is because the appellants have in the letter of the customs department dated 28 March 2016 at p 303 of the appeal record Vol IV agreed to unfreeze the ten accounts as listed except the said two accounts and the respondents did not cross-appeal against the continued freezing of the two accounts. These accounts were frozen pursuant to s 44 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities

Act 2001 and that the customs department letter was in response to the request of the respondents *vide* a letter of their counsel dated 23 January 2016 (at pp 278–292 of the appeal record Vol III). I need to mention that in this very same letter a request was also made to release the other items/goods seized from the respondents. However, even before that reply by the Customs Department, the respondents filed a notice of motion dated 29 February 2016 for the release of all the items/goods seized as well as the unfreezing of all the bank accounts; the subject matter of this appeal.

THE HEARING ON 31 MARCH 2016

[4] Premised on the aforesaid consent of the customs department in their said letter dated 28 March 2016 and at the hearing on 31 March 2016, the learned sessions court judge, after hearing the submission of Mr Shankar Ram for the respondents (applicants before the sessions court) but not of the learned deputy public prosecutor for the appellants who asked for another date as they have not filed any affidavit in reply, made the order for release except for the two disputed accounts. In respect of these accounts she fixed 13 April 2016 at 9am for hearing. This is reflected in her order as shown in the notes of proceedings at p 20 of the additional appeal record which I now reproduced below:

> Having considered the submission by both parties and the letter dated 28 March 2016 from Customs, order is granted for the release of all the items in encl 1 save for para 3.1 and 3.5 at p 6 of encl 1 to be dealt with at a later date by this court which was now fixed on 13 April 2016 at 9am.
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> As indicated by the learned DPP of the charge to be preferred against the second applicant, this to be done urgently and if there is yet to be any charge filed by 13 April 2016, this court will make and consider appropriate order for the release of the items.

[5] However, instead of 13 April 2016, the case was mentioned on 11 April 2016, which according to the learned deputy public prosecutor and as shown in notes of proceedings at p 22 of the additional appeal record, was for clarification of the order made on 31 March 2016. This hearing was fixed as requested by her in her letter dated 1 April 2016. She also informed the court that an appeal has been filed against the court order dated 31 March 2016 as well as the affidavit to oppose the application for the release ie, the notice of motion. A notice of application for stay of execution of the order has also been filed, she told the court. The learned sessions court judge held that no clarification was necessary in view of the appeal and the application for stay. She adjourned the case to 13 April 2016 'for further submission of counsel/deputy public prosecutor (if any)'. On 13 April 2016, the parties proceeded to make their submissions on both the notice of motion and the stay application. The

court reserved decision to 27 April 2016 and on the date the learned sessions court judge delivered the grounds of her decision which appears at pp 1–15 of the additional appeal record.

THE GROUNDS OF DECISION

[6] In these grounds the learned sessions court judge did not touch on her earlier decision made on 31 March 2016 to release the goods/items to the respondents and concentrated her mind on the continued freezing of the two accounts (not the subject of the appeal as I have mentioned earlier) and her reason for not granting the stay. The reasons she gave for not doing so, ie, granting the stay — from pp 7–14 of the appeal record actually justified the order for release made earlier and in the last two paragraphs of the grounds ie, paras 32 and 33 this was how she concluded and summarised her grounds for not granting the stay:

> [32] The failure of the respondents to initiate a prosecution within one calendar month of the seizure, non-referral of the seized goods to the Magistrate of first class, are fatal and does not warrant a stay of execution just because a *charge had been preferred against the second applicant on the 8 April 2016* which was only preferred after the court had made the order on 31 March 2016.
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> [33] On the above grounds, the application for stay is dismissed. (Emphasis added.)

[7] Despite the dismissal of the stay application, I have ascertained from the learned deputy public prosecutor at the hearing before me that the goods/items seized have remained with the customs department which given the said dismissal order, spoke well of the magnanimity of the respondents and their counsel.

THE APPEAL

[8] The learned deputy public prosecutor in her written submission said that it was wrong for the learned sessions court judge to rely on the non-prosecution within one month of seizure under s 128 of the Customs Act 1967 ('the Act') to justify the release of the goods for the correct provision is s 114 of the Act. Mr Shankar Ram of course contended otherwise because as can be seen from the highlighted grounds of decision which is also an undisputed fact, the charge against second respondent Chong Yin Kim was only preferred on 8 April 2016. The seizure was as stated earlier made on 1 November 2015 and the notice of motion for the release was filed on 29 February 2016. It is also clearly stated in the notice of motion that the application for release was made under ss 115, 128 and 129 of the Act and it is to be noted that s 115 is the provision which gives a customs officer the power to return goods seized which are the subject matter of an offence to the owner and is a follow-up provision from s 114 which sanctions the seizure by a

customs officer of goods which are or reasonably suspected to be used in the commission of an offence under the Act.

[9] I agree with the learned deputy public prosecutor when I read both ss 128 and 114 that these are distinct provisions and I also share her view that s 128 does not stipulate that the prosecution of the offence for the goods seized must be done within one month from the date of the seizure. Section 128 only deemed forfeiture of the goods seized if there was no prosecution within one month from the date of the seizure unless the three situations as stated in sub-s (1)(a)–(c) happened. The said sub-section provides:

> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to para 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:
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> (a) a claim to such goods or the proceeds of sale of such goods is made under sub-s (2);
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> (b) a written application is made for the return of such goods under para 115(1)(a) or (b); or
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> (c) such goods are returned under the said para (a) or (b).

[10] In support of the application and at the hearing before the learned sessions court judge and me, the respondents' contention particularly with respect to the beers was that they have a life-span of three to six months which was not refuted in anyway by the appellant. Given the deeming provision on the forfeiture as reproduced above and the undisputable fact that there was no charge preferred within the one month period after the seizure, the respondents could not be faulted for being jittery about the continued detention of the goods since their application for the release made in their counsel's letter dated 23 January 2016 was not acceded to. Further by raising s 115 in their notice of motion, the respondents acknowledged that the discretionary power to return the seized goods to them lies with the customs officer. The learned sessions court judge of course did not consider the affidavit in opposition to the notice of motion filed by the appellants on 8 April 2016 because she made the order without even hearing the submission of the learned deputy public prosecutor on the merits of the application and against the latter's request to have the matter heard on another day. This fact I have outlined earlier in the judgment. Be that as it may, when I read that affidavit (at pp 52–55 of the appeal record Vol 1) the reason for opposing the release of the goods appears to be the failure of the respondents to make a written claim for the seized goods within one month from the date of the seizure as stated in the notice of seizure ('exh CYK2') served on the second respondent by the raiding officer, Azman bin

Abdul Wahab. Before me the learned deputy public prosecutor also submitted that the order for release was bad because the goods seized were the subject matter of the charge which is still pending in court. Granted that it is so, s 115(1) clearly confers on the customs officer the power to return the goods pending the trial but subject to terms and condition. The said sub-section reads:

115 Return or disposal of movable property.

(1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion:

(a) temporarily return the movable property to the owner thereof or to the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto, subject to such terms and conditions as a senior officer of customs may impose, and, subject, in any case, to sufficient security being furnished to the satisfaction of a senior officer of customs that the movable property shall be surrendered to a senior officer of customs on demand being made by a senior officer of customs and that the said terms and conditions, if any, shall be complied with; or

(b) return the movable property to the owner thereof or to the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto, with liberty for the person to whom the movable property is so returned to dispose of the same, such return being subject to security being furnished to the satisfaction of a senior officer of customs in an amount not less than an amount which, in the opinion of a senior officer of customs, represents:

(i) for property other than dutiable or uncustomed goods, its open market value, and for dutiable or uncustomed goods, their value, on the date on which the property or goods are so returned;

(ii) the customs duty payable in respect thereof; and

(iii) any tax payable in respect thereof under any written law, for the payment of the amount so secured to the director general in the event of the court making an order for the forfeiture of such amount under s 127(1A) or s 128(4) or in the event of such amount being forfeited under s 131, as the case may be; or

(c) sell or destroy the movable property, as appropriate in the circumstances, where it is a living creature or where, in the opinion of a senior officer of customs, it is of a perishable or dangerous nature or likely to speedily deteriorate in quality or value, and where it is so sold, he shall hold the proceeds of sale to abide the result of any prosecution or claim or a forfeiture under s 131, as the case may be.

[11] The release of the goods seized cannot be said to be wrong because the said section allows it but it comes with certain safeguards which the learned sessions court judge should have but with respect did not do so in this case.

[12] Thus, I would affirm her decision to release the seized goods in Lampiran A of the notice of seizure ie, the gunny sacks of sugar and alcoholic beverages subject to photographs of the same be taken (after all have been properly marked) which photographs are to tendered at the trial for Mr Shankar Ram had agreed at the proceedings before the learned sessions court judge on 11 April 2016 (appearing at p 24 of the additional appeal record) that such photographs be evidence of the seizure. Given his agreement and the particularisation of the beverages there can be no prejudice to either parties for the non-production of the physical exhibits. This decision is also grounded on practicality — it not only saves the court the arduous task of marking these exhibits but of keeping them after they are tendered as court exhibits, even if the appellants do not mind the trouble of ferrying them to court before the exhibits are so tendered. As for the invoices and other documents, certified true copies of the same jointly signed by an authorised custom officer and any one of the respondents or one authorised by them should be made and tendered in place of the originals since the respondents were desirous of the return of the same. Otherwise, the parties can agree to leave out these records and/or documents from the release order.

[13] In respect of the laptop and other three instruments seized as per items 35–38 of the release order at p 12 of the Vol 1 of the appeal record, the appellants in the affidavit in opposition did not justify the reason(s) why they should continue to be detained or in what manner their release would jeopardise or prejudiced a fair trial of the action. Therefore, the order for their release should be affirmed with the respondents' undertaking to produce them at the trial.

[14] Finally, as per s 115(1)(b), the respondents should be allowed to sell the gunny sacks of sugar and alcoholic beverages but on the condition that they deposit into court the amount of tax and duty payable on them in the sum RM372,508.84 before their release. Such deposit is to be made in the name of the registrar in an interest bearing account of the respondents' choice to await the outcome of the trial.

[15] In view of my decision on the order of release above, the appeal against the stay order is rendered redundant. As for the arguments raised by Mr Shankar Ram on the merits of the charge pending in the magistrate's court, I have made a conscious decision not to consider them in order not to compromise the pending trial — that should be left for the appeal against the decision in respect of the trial, if any, later.

Order accordingly.

Reported by Dzulqarnain Ab Fatar